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UNCLAS SECTION 01 OF 03 SHANGHAI 000545

SENSITIVE
SIPDIS

USTR FOR CHINA OFFICE - TSTRATFORD, AWINTER, TWINELAND, DKATZ;
IPR OFFICE - RBAE; AND OCG - TPOSNER
DOC FOR NATIONAL COORDINATOR FOR IPR ENFORCEMENT - WPAUGH
DOC FOR ITA/MAC: SZYMANSKI, YOUNG
LOC/ COPYRIGHT OFFICE - STEPP
USPTO FOR INT'L AFFAIRS - LBOLAND
DOJ FOR CCIPS - TNEWBY
FBI FOR LBRYANT, KSHIRLEY
DHS/ICE FOR IPR CENTER - DFAULCONER
DHS/CBP FOR IPR RIGHTS BRANCH - GMACRAY
TREASURY FOR OASIA - DOHNER/CUSHMAN
NSC FOR LOI, SHRIER

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SUBJECT: IPR INTERNET PROGRAM BUILDS CAPACITY IN EAST CHINA

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¶1. (SBU) Summary: During a November 20-21 U.S. Patent and Trademark Office (PTO)-sponsored trip to Nanjing and Shanghai, Department of Justice Trial Attorney Tyler Newby, Federal Bureau of Investigation Supervisory Special Agent Kiffa Shirley, and PTO Trade Policy Analyst Susan Tong held two capacity-building seminars on investigating and prosecuting Internet-related intellectual property (IP) cases. A wide-range of IP administrative officials, Public Security Bureau (PSB) officers, prosecutors, and judges participated in a lively exchange with the delegation on issues including liability of final users, criminal thresholds, evidence collection, case valuation, and possibilities for further cooperation. The delegation also participated in a roundtable with representatives from U.S. industries in Shanghai on ways to protect IP on the Internet. Interest and willingness to engage on the issue among officials is a reflection of the growing push to crack down on Internet-based piracy in East China. End Summary.

Jiangsu: Challenges on Internet-Related IP Cases

¶2. (SBU) In Jiangsu, the provincial IP Administration hosted the seminar, which was attended by Jiangsu Public Security Bureau Cybercrime Division official Pu Tiangao, Jiangsu Procuratorate Officer Wang Xiangying, Jiangsu High Court Judge Tang Maoren, and Deputy Director of the Jiangsu IP Office Yang Xuejing. Yang emphasized that Jiangsu is focusing on IP protection on the Internet as a part of the province's overall effort to protect IP. He also noted that the Jiangsu Provincial IP Strategy, which is based on the national IP Strategy, will be released at the end of this year. Yang also emphasized that Jiangsu attaches great importance to communication and cooperation with the U.S. Government and American industries on IP protection, noting Jiangsu's current benchmarking project with the U.S. Chamber of Commerce.

¶3. (SBU) Following the presentation, Chinese attendees posed a wide variety of questions: Under what circumstances are undercover operations considered entrapment? Is it considered a

crime for the general public to download pirated software from the Internet in the United States? What is the threshold for criminal liability on copyright infringement on the Internet? How does the FBI monitor instant messaging such as MSN to collect evidence? Who controls or manages the Internet Service Providers in the United States?

Verifying Legitimacy - A Real Struggle

14. (SBU) Attendees also noted obstacles in handling Internet-related IPR cases in China such as verifying the legitimacy of products sold on the Internet as well as the legitimacy of material that can be downloaded. Wang said that China is unlike the United States where industry associations, such as the Motion Picture Association and/or the rights holder, verify authenticity. In China, such authentication by an industry association or rights holder would be regarded as biased and lacking in authoritativeness. Chinese enforcement authorities prefer to find an independent technical appraisal entity to do the authentication. However, it is difficult to find an entity that is both qualified to verify legitimacy and considered sufficiently objective.

15. (SBU) Jiangsu officials also stressed the importance of cooperation in the global age for tackling cross-border Internet-related crime. PSB Cybercrime Division official Pu pointed out that the Jiangsu PSB has conducted several cases on Internet gambling, but it was difficult for them to continue the investigation when they found that the ISPs were located in the United States. Newby encouraged him to refer the case to the Joint Liaison Group (JLG) or contact the Legal Attache at the U.S. Embassy in Beijing. Pu also mentioned a certain case, which had been jointly investigated by U.S. and Chinese law enforcement officials through the JLG and is currently in the hands of the Suzhou Procuratorate. He noted this case was a

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good example of joint cooperation.

Shanghai: Eager for Further Cooperation

16. (SBU) Attendees at the Shanghai seminar, which was hosted by the Shanghai IP Administration, included Shanghai PSB Economic Crime Investigation Division (ECID) Deputy Director Tang Xiliang, Shanghai PSB Cultural Protection Section official Fu Zukang, Shanghai Procuratorate Litigation Department Deputy Director Guo Feili, Shanghai High Court Criminal Division Assistant Director Zhou Qiang, Shanghai No.2 Intermediate Court Judge Fei Ye, Shanghai Copyright Bureau official Shi Shidong, and six other IP-related officials. Guo described Shanghai's procuratorate system, noting that IP criminal cases are usually handled by the procuratorates at the district level. When cases are referred from the PSB, it is at the discretion of procuratorate to decide if the prosecution should go forward.

17. (SBU) According to Guo, most criminal Internet-related IPR cases are related to copyright infringement, especially Internet game piracy through private servers. Shanghai Procuratorate has also looked at cases of counterfeit medicine and clothes sold over the Internet. However, Shanghai's investigation and prosecution of Internet-related IP cases is still at the beginning stage. Guo acknowledged that the Shanghai Procuratorate still lacks knowledge of how to handle these cases. Currently, the Shanghai Procuratorate is consulting with technical and legal specialists to boost their capabilities, as well as reaching out to victims of Internet-based piracy. The Shanghai Procuratorate also works closely with the Shanghai Public Security Bureau, especially the Internet Supervision Department, for technical support. Guo also addressed the need for international coordination, particularly mentioning cases of counterfeit pharmaceuticals sold via the Internet. In his experience with such cases in Shanghai, it has been difficult to collect evidence to secure a conviction.

¶8. (SBU) Shanghai PSB ECID Deputy Director Tang welcomed the opportunity to coordinate with U.S. authorities on IP-related cases. He said he is also willing to cooperate on a specific case raised by Newby, which has a Shanghai connection and is related to the notorious case of an American citizen convicted several years ago due to his role in selling pirated DVDs. That earlier case was a landmark in bilateral legal cooperation on IPR-infringement cases. Tang and other attendees asked a broad range of questions on IP-related issues, including the FBI's case valuation methods, FBI practices on ex officio investigations, and rights holders' participation in the evidence gathering and witness process.

Industry: Problems Exist But Progress Is Being Made

¶9. (SBU) In a separate Shanghai roundtable with U.S. business representatives, Newby, Shirley and Tong discussed Internet-related IP enforcement in China. Besides inquiring about U.S. law enforcement practices and law regarding Internet-based piracy, business representatives outlined some of the hurdles they face in China on IP protection, most notably the verification of pirated DVDs and CDs. It is difficult to find an agent to verify pirated copies although there is a government lab in Shenzhen that has the requisite testing capabilities. In even the most obvious cases of pirated DVDs, Chinese enforcement authorities insist on a report from a neutral agent. Quality Brand Protection Committee (QBPC) Chairman Jack Chang said the local PSB awareness of IP enforcement was improving due to QBPC's and others' efforts. QBPC has signed a Memorandum of Understanding with several local PSBs to help boost enforcement. Regarding procuratorate offices in East China, he said there is a general hesitancy to prosecute IPR cases, which affects PSB willingness to investigate.

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Greater efforts need to be taken to promote IPR awareness among procuratorate offices and judges in criminal divisions, Chang recommended.

A Groundbreaking Counterfeit Case In Shanghai

¶10. (SBU) Chang also noted that the "Shanghai Initiative," in which the PSB initiates cases based on prima facie evidence at an early stage, is going well, but it is sporadically implemented throughout Shanghai. He illustrated a case in the Qingpu District of Shanghai involving fake auto parts. The Shanghai Administration of Industry and Commerce was the first to catch wind of the infringement and immediately notified the PSB. Together the two agencies investigated the case, and, according to Chang, PSB involvement in the early stages of the case was key to collection of evidence and preservation of the infringer's assets. When it came to case valuation, there was no label price on the seized goods although the infringer provided some trade contracts showing a very low price. The AIC and PSB declared that the contracts were unable to be verified and instead calculated the damages based on the price of legitimate products. Chang stressed this was unique to the Qingpu case and offered an example of a separate case involving General Electric products in Shanghai's Minhang District. The PSB in Minhang calculated the damages based on the much lower price shown in the contract, which was provided by the infringers.

¶11. (SBU) In the Qingpu case, the value of the detained products was RMB 120 million (USD 17.7 million). From the total amount of detained products, there were 19 right holders who confirmed products were counterfeit and valued at RMB 8.2 million RMB (USD 1.2 million). Accordingly, the Shanghai AIC fined the infringer RMB 7.5 million (USD 1.1 million), which is considerably high in comparison to a typical fine. The PSB's investigation also came on came top of AIC's fine, which is

unusual because PSB seldomly accepts cases after AIC has already "punished the infringer." In addition, one suspect in Shanghai was convicted; however the Taiwan leader of the Qingpu criminal operation fled back to Taiwan to avoid arrest.

Comment

¶12. (SBU) The PTO-sponsored program on Internet-based piracy is the result of an initial request from the Shanghai IP Administration to receive U.S. expertise on the topic. Shanghai and Jiangsu IP officials have long told us they are keen to be in the forefront of China's efforts to prosecute Internet-related IP cases. Their efforts to reach out to their U.S. counterparts and the savvy questions they posed demonstrated they have seriously considered the issue and are trying to move towards more aggressive enforcement. Capacity-building programs such as this one go far in showing U.S. commitment to working on this international issue at a local level, where a real difference can be made.

¶13. (SBU) Cleared by Acting IPR Attache in Beijing.
CAMP